

Nikula vs. Finland: de expressievrijheid van de advocaat

Enkele jaren geleden werd Anne Nikula, een advocate kantoorhoudend toen in Helsinki, correctioneel veroordeeld omdat zij tijdens een strafproces in een pleitnota lasterlijke kritiek had geuit. (Een verkorte versie van deze uitspraak is na dit artikel afgedrukt.) In haar pleitnota beschuldigde Nikula de openbare aanklager (T.) van machtsmisbruik, manipulatie van een getuige en onwettige bewijslevering. Volgens het Europees Hof is deze veroordeling in strijd met de vrijheid van meningsuiting (art. 10 EVRM): het openbaar ministerie moet immers tijdens een proces flink wat kritiek van de tegenpartij kunnen verdragen. De veroordeling van Nikula had een duidelijke wettelijke basis (art. 27 § 2 van het Fins strafwetboek) met als legitiem doel de bescherming van het gezag van de rechterlijke macht, maar het Hof acht deze sanctie niet noodzakelijk in een democratische samenleving. Een volledige immuniteit voor advocaten wijst het Hof echter af. Tegelijk wordt een onderscheid gemaakt tussen kritiek die door een advocaat wordt geuit in de conclusies of tijdens de pleidooien enerzijds en kritiek buiten de rechtszaal, in interviews of in artikels in de media anderzijds. Een interessant arrest dat enkele ijkpunten uitzet in verband met de expressievrijheid van advocaten.¹

Mag een advocaat (een lid van) het OM schofferen?

In de zaak Schöpfer tegen Zwitserland (20 mei 1998) heeft het Hof al benadrukt dat van advocaten mag verwacht worden dat zij bijdragen tot een goede rechtsbedeling en tot het vertrouwen in justitie. Vooral het feit dat Schöpfer tijdens een door hem georganiseerde persconferentie scherp was uitgevallen tegen justitie en de noodbel had geluid nog voor alle rechtsmiddelen waren uitgeput, was voor het Hof voldoende reden om toen een lichte tuchtrechtelijke sanctie te rechtvaardigen en géén schending vast te stellen van artikel 10 EVRM.²

In het arrest in de zaak Nikula tegen Finland van 21 maart 2002 herneemt het Hof de stelling dat

‘the special status of lawyers gives them a central position in the administration of justice as intermediaries between the public and the courts. Such a position explains the usual restrictions on the conduct of members of the Bar (...).

¹ Zie eerder o.a. EHRM 20 mei 1998, Schöpfer vs. Zwitserland, waarin het Hof van oordeel was dat een sanctie wegens al te scherpe en vooral voorbarige kritiek op de lokale justitiële autoriteiten de toets aan artikel 10 EVRM kon doorstaan. Andere zaken i.v.m. expressievrijheid waarin advocaten verzoekende partij waren: EHRM 26 april 1991, Ezelin vs. Frankrijk (vrijheid van meningsuiting van advocaat tijdens betoging, kritiek op justitiebeleid. Wegens vaststelling schending van artikel 11 EVRM, geen noodzaak tot verder onderzoek of er

Dirk Voorhoof
Prof. dr. D. Voorhoof is gewoon hoogleraar aan de Universiteit Gent waar hij o.a. mediarecht en auteursrecht doceert.

Regard being had to the key role of lawyers in this field, it is legitimate to expect them to contribute to the proper administration of justice, and thus to maintain public confidence therein’.

Hoewel advocaten in de uitoefening van hun expressievrijheid gerechtigd zijn om kritiek uit te oefenen op disfuncties binnen het gerecht, toch mogen bepaalde grenzen niet overschreden worden, of zoals het Hof het uitdrukt: ‘their criticism must not overstep certain bounds’. Uiteindelijk gaat het er om een juist evenwicht te vinden tussen het recht op informatie in verband met bepaalde rechterlijke beslissingen en het respect dat advocaten verschuldigd zijn tegenover het gezag van de rechterlijke macht en de waardigheid van het beroep van advocaat (‘the dignity of the legal profession’).

De kritiek van Nikula op het openbaar ministerie in de persoon van T. was verwoord in een pleitnota en werd uitgesproken tijdens de terechtzitting. Er was volgens het Hof een relevant verschil met het in de media door een advocaat

schending was van artikel 10 EVRM); EHRM 9 juni 1998, Incal vs. Turkije (advocaat als auteur van politiek pamflet veroordeeld wegens het vermeend aanzetten tot geweldpleging tegen de Turkse Staat. Schending van artikel 10 EVRM) en EHRM 7 februari 2002, E.K. vs. Turkije (advocate, mensenrechtenactiviste, veroordeeld wegens publicaties met kritiek op Turkse overheid en aanzet tot terrorisme. Schending van artikel 10 EVRM). Zie ook EHRM 15 mei 2001, M.-H. Mattei vs. Frankrijk, nr. 40307/98 (klacht niet ontvankelijk).

bekritiseren van een rechter of parketmagistraat.³ Het Hof relateert het belang van de expressievrijheid van de advocaat ook aan de rechten van de verdediging. Een inmenging in de uitingsvrijheid van een advocaat naar aanleiding van diens tussenkomst tijdens een proces zou immers een schending kunnen opleveren van artikel 6 EVRM omdat op die manier de verdachte riskeert een eerlijk proces te mislopen. Zoals het Hof het uitdrukt: ‘Equality of arms and other considerations of fairness therefore also militate in favour of a free and even forceful exchange of argument between parties.’ Het Hof voegt er wel onmiddellijk aan toe dat het niet akkoord kan gaan met een door verzoekster geclaimde ongelimiteerde expressievrijheid. De expressievrijheid van de advocaat is in deze omstandigheden dus niet absoluut; toch moet vastgesteld worden dat in de praktijk een correctionele veroordeling maar moeilijk te rechtvaardigen is. Het Hof lijkt er voor te opteren dat scherpe uitvallen tussen de partijen of tegen het openbaar ministerie maar beter door de voorzitter van de rechtbank zelf kunnen worden gemedieerd ‘rather than to examine in a subsequent trial the appropriateness of a party’s statements in the court room’.

Hoewel de uitval door Nikula tegen de openbare klager ongemeen scherp was, zelfs ‘inappropriate’, toch komt het Europees Hof tot de slotconclusie dat er geen noodzaak was om Nikula te veroordelen. Bijkomende argumentatie haalt het Hof uit de omstandigheid dat de kritiek te maken had met het professioneel optreden van de openbaar klager tijdens een strafproces, en de aantijgingen dus eerder tegen het ambt dan tegen zijn persoon waren gericht. Het Europees Hof grijpt ook het feit aan dat eerst de klacht van T. werd geseponneerd en de strafzaak tegen Nikula dus werd gevoerd na rechtstreekse dagvaarding achteraf door T. (‘private prosecution’). Dit én dan ook nog eens de minderheidsopinie van het Hoogerechtshof waarin werd aangedrongen op de vrijspraak van Nikula, zijn volgens het Europees Mensenrechtshof allemaal indicatoren die erop wijzen dat de nationale autoriteiten het er allerminst over eens waren dat de veroordeling van Nikula beantwoordde aan een ‘pressing social need’. Volgens het Hof is er daarom een schending van artikel 10 EVRM.

Rechtsvergelijkend: Interights-rapport

Het Europees Hof verwijst ook opmerkelijk en nadrukkelijk naar de wetgeving en rechtspraktijk in enkele andere EVRM-lidstaten, waaronder Nederland en België (§ 22-26). Dit rechtsvergelijkend materiaal werd in de loop van de procedure aangeleverd door Interights, een internationale mensenrechtenorganisatie die vanuit Londen opereert.⁴ Het Hof wijst op de smalle beleidsmarge die aan de lidstaten toekomt bij het afdwingen van restricties op de expressievrijheid van de advocaat, er de aandacht op vestigend dat ‘in most of the jurisdictions surveyed by the intervenor they are rarely used in practice, and then usually only in extreme circumstances and

provided that intent can be shown, as opposed to mere negligence’. Nog belangrijker is allicht de vaststelling dat wanneer scherpe kritiek of lasterlijke aantijgingen verband houden met de zaak zelf, over het algemeen een strafrechtelijke immuniteit geldt: ‘Even when a lawyers’ statements may in principle be subject to restrictions, those are generally imposed only when the statement is not only defamatory but also entirely unrelated to the proceedings of the parties’. Uit het door Interights gerapporteerde rechtsvergelijkend onderzoek blijkt overigens dat het openbaar ministerie, veel meer nog dan de magistraten van de zetel, een flinke portie kritiek moet kunnen verdragen. Het rapport toont volgens het Hof aan dat er een fundamenteel verschil is ‘between the role of the prosecutor, being the opponent of the accused, and the judge. This distinction generally provides an increased protection for statements that are critical of the prosecutor’. Volgens het Hof heeft dit verschil ook tot gevolg dat een bijkomende bescherming moet worden gewaarborgd ‘for statements whereby an accused criticises a prosecutor as opposed to verbally attacking the judge or the court as a whole’ (§ 50).

Uit het rapport van Interights blijkt ook nog dat in een aantal landen een ‘privilegie’ is toegekend aan de advocaten, een soort relatieve immuniteit dus met betrekking tot uitspraken of stellingnames die zij innemen in het kader van de verdediging van hun cliënten. Het Hof haalt aan dat ‘the privilege for allegedly defamatory statements allows counsel to argue as effectively as possible, relying even on facts which they cannot be sure are true’. Het Hof refereert expliciet naar de situatie in Nederland, erop wijzend dat ‘in the Netherlands, allegations that the prosecutor has abused his or her discretion are regularly made by defence lawyers. Potentially relevant allegations which are entirely unsubstantiated are simply disregarded’.

Het arrest in de zaak Nikula maakt alvast duidelijk dat sancties, ook lichte sancties, in deze materie zeer uitzonderlijk moeten blijven en maar moeilijk kunnen beschouwd worden als ‘noodzakelijk in een democratische samenleving’. De EVRM-lidstaten hebben nauwelijks enige beleidsmarge om van dit strakke standpunt van het Europees Hof af te wijken. Het arrest onderkent aldus ten volle de waarborgen die gelden in o.a. Nederland en België, volgens welke de advocaten hun ambt vrij oefenen als garantie op een eerlijk proces. In het Interights-rapport benadrukte C.H. Brants, onder verwijzing naar de stand van het recht en de rechtspraktijk in Nederland, dat ‘the lawyer has a special function in safeguarding the fundamental rights of fair trial, which encompasses the right to an adequate defence, and must be free to put forward the facts and arguments that he/she deems necessary and reasonable to fulfil that function (...)’. The threat of prosecution for statements made in court (...) infringes that freedom and endangers said fundamental rights and the rule of law in a democratic society. It would have a chilling effect on the capacity of lawyers in future(...)’.⁶ Het Hof zit helemaal op dezelfde lijn en

² EHRM 20 mei 1998, Schöpfer vs. Zwitserland, *Mediaforum* 1998-7/8, Vgl. Commissie 13 maart 1986, Prince vs. V.K., nr. 11456/85.

³ Al moeten rechters ook wel bestand zijn tegen flinke kritiek die in de media is geuit: EHRM 24 februari 1997, De Haes en Gijssels vs. België. Vgl. EHRM 22 februari 1989, Barfod vs. Denemarken en EHRM 26 april 1995, Prager en Ober-schlick vs. Oostenrijk. Voor kritiek in de media op leden van het openbaar ministerie: EHRM 19 april 2001, Marónek vs. Slovaakse en vooral EHRM 25 juli 2001, Perna vs. Italië.

⁴ Het Hof verwijst naar een aantal zaken waarin de Commissie concludeerde tot de niet-ontvankelijkheid van de klacht van een advocaat. Volgens het Hof ging het in deze zaken telkens om lasterlijke beledigingen van persoonlijke aard, los van een ruimere maatschappelijke context of geheel los van de rechten van

de verdediging (Commissie 30 juni 1997, W.R. vs. Oostenrijk, nr. 26602/95 en Commissie 14 januari 1998, Mahler vs. Duitsland, nr. 29045/95).

⁵ Het rapport in de zaak-Nikula dat aan het Hof werd voorgelegd is te consulteren via de website van Interights: <http://www.interights.org>. De ‘statement’ in verband met de situatie in Nederland werd geschreven door C.H. Brants (Universiteit Utrecht). De Belgische rapportage gebeurde door de auteur van dit artikel.

⁶ C.H. Brants, ‘Statements by lawyers in court and public defamation: the position under Dutch law’, in M.Meier-Wang, *Written comments by Interights, pursuant to Rule 61 of the Rules of the Court*, London, March 2001, <http://www.interights.org>.

poneert dat het eerder aan de advocaten zelf toekomt, desgevallend onder toezicht van de Orde van Advocaten, 'to assess the relevance and usefulness of a defence argument without being influenced by the potential "chilling effect" of even a relatively light criminal sanction or an obligation to pay compensation for harm suffered or costs incurred'. Daarom ook stelt het Hof zich zeer afwijzend op tegenover strafvervolgning naar aanleiding van bepaalde opinies of standpunten van de advocaat tijdens de terechtzitting en in diens conclusies. Weliswaar geen immuniteit dus, maar 'it is only in exceptional cases that restriction – even by way of a lenient criminal sanction – of defence counsel's freedom of expression can be accepted as necessary in a democratic society'.

Nikula-arrest: consequenties voor Nederland en België ?

Voor wat Nederland en België betreft voegt het Nikula-arrest op het eerste zicht niet veel toe aan de waarborgen voor de expressievrijheid van advocaten. In Nederland is er geen sprake van een strafbare uiting (smaad, art. 261 Sr.), wanneer de aantijgingen gerechtvaardigd zijn door het openbaar belang dat m.n. verboden is met het fundamenteel recht op verdediging door een onafhankelijk raadsman die is opgetreden als een 'goed advocaat'. In dit geval is er geen wettelijke basis voor strafvervolgning. Het Interights-rapport vermeldt dat er daarom in Nederland geen voorbeelden zijn van strafvervolgning, laat staan dat er veroordelingen zouden zijn van advocaten voor standpunten die werden ingenomen in het kader van de verdediging van hun cliënten. Wel wordt melding gemaakt van enige irritatie naar aanleiding van een paar recente voorbeelden waarin sommige advocaten wel bijzonder scherp tekeer zijn gegaan in hun uitval naar het openbaar ministerie of politie. Maar Brants concludeert dat 'it is however still agreed that it will be the profession itself that will have to develop the rules'.

Ook het Belgisch Strafwetboek (art. 452) en het Gerechtelijk Wetboek (art. 444) waarborgen tot op zekere hoogte 'de immuniteit van het pleidooi' of het 'privilegie van de advocaat'. Volgens artikel 452 Sw. geven de voor de rechtbank gesproken woorden en aan de rechtbank voorgelegde geschriften geen aanleiding tot strafvervolgning wanneer die woorden of die geschriften op de zaak of op de partijen betrekking hebben. Geen mogelijkheid van strafvervolgning dus wegens smaad, laster of belediging van het OM, tenminste als de aantijgingen met de zaak verband houden. De rechtspraak toont echter aan dat soms nogal gemakkelijk wordt aangevoerd dat de aantijgingen of beledigingen aan het adres van de zetel of het OM geen verband houden met de zaak of de partijen.⁷ Overigens blijft ook nog de mogelijkheid bestaan van tuchtrechtelijke sanctiëring via de Raad van de Orde: 'Indien een advocaat in zijn pleidooien of in zijn geschriften kwaadwillig de Monarchie, de Grondwet, de wetten van het Belgische volk of het gevestigd gezag aanvalt, kan de rechtbank of het Hof waarvoor de zaak aanhangig is, door de griffier proces-verbaal doen opmaken en het incident brengen voor de Raad van de Orde waaronder de betrokkene ressorteert.' Aangezien een tuchtsanctie door de Orde van Advocaten⁸ kan worden beschouwd als een overheids-

inmenging,⁹ moet ook een dergelijke maatregel evenwel de toets aan artikel 10 § 2 EVRM kunnen doorstaan.

Nikula vs. Finland

[Zie ook de samenvatting op p. 216]

EHRM 21 maart 2002, Application no. 31611/96

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Nikula v. Finland,

The European Court of Human Rights (Fourth Section), sitting as a Chamber composed of:

Mr. G. Ress, President,

Mr. A. Pastor Ridruejo,

Mr. L. Caflisch,

Mr. I. Cabral Barreto,

Mr. V. Butkevych,

Mrs. N. Vajic,

Mr. M. Pellonpää, Judges,

And Mr V. Berger, Section Registrar,

Having deliberated in private on 20 September 2001 and on 28 February 2002,
Delivers the following judgment, which was adopted on the last-mentioned date:

Procedure

(...)

The facts

I. The circumstances of the case

A. The criminal proceedings against the applicant's client

(...)

B. The defamation proceedings against the applicant

(...)

II. Relevant domestic law and practice

(...)

III. Comparative law and practise

(...)

A. Submissions by Interights

22. The intervenor concluded from its survey of a number of member States of the Council of Europe (i.e. Belgium, Den-

Orde heeft opdracht om: de eer van de Orde van advocaten op te houden; de beginselen van waardigheid, rechtschapenheid en kiesheid die aan hun beroep ten grondslag liggen, te handhaven (...).

9 Zie o.a. EHRM 26 april 1991, Ezelin vs. Frankrijk en EHRM 24 april 1994, Casado Coca vs. Spanje.

mark, France, Italy, the Netherlands, Spain, Sweden and the United Kingdom) as well as of certain other States (Australia, Canada and South Africa) that a great majority of them accord a privilege to lawyers for statements they make while representing clients in court. Although the extent and application of such privilege may differ from jurisdiction to jurisdiction, every surveyed State recognises that a lawyer's ability to express himself or herself is closely linked to counsel's obligation to defend the client. The privilege for allegedly defamatory statements allows counsel to argue as effectively as possible, relying even on facts which they cannot be sure are true. For example, in the Netherlands allegations that the prosecutor has abused his or her discretion are regularly made by defence lawyers. Potentially relevant allegations which are entirely unsubstantiated are simply disregarded.

23. To the extent that restrictions are permitted on a lawyer's statements in court, most of the jurisdictions surveyed by Interights tend to favour the use of disciplinary measures over criminal sanctions. In the view of the intervenor, this might reflect the position taken by the Court in the context of Article 10, namely that a relatively light criminal sanction may already serve to chill even appropriate and measured criticism (see, for example, the Thorgerir Thorgerirson v. Iceland judgment of 25 June 1992, Series A no. 239).

24. Where criminal sanctions are permitted in theory, in most of the jurisdictions surveyed by the intervenor they are rarely used in practice, and then usually only in extreme circumstances and provided that intent can be shown, as opposed to mere negligence. Even where a lawyer's statements may in principle be subject to restrictions, those are generally imposed only when the statement is not only defamatory but also entirely unrelated to the proceedings or the parties.

25. Furthermore, almost all of the jurisdictions surveyed by the intervenor recognise the fundamental difference between the role of the prosecutor, being the opponent of the accused, and the judge. This distinction generally provides an increased protection for statements that are critical of the prosecutor.

26. It is the intervenor's conclusion that in most of the surveyed jurisdictions it is unlikely that a defence lawyer would be criminally prosecuted for having criticised the manner in which a prosecutor is handling a case or for having indicated that the prosecutor has abused his or her discretion. On such facts recourse to criminal proceedings would not be deemed necessary.

B. Principles adopted by international organisations

27. According to § 20 of the Basic Principles on the Role of Lawyers (adopted in 1990 by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders), lawyers shall enjoy 'civil and penal immunity for relevant statements made in good faith in written or oral pleadings in their professional appearances before a court, tribunal or other legal or administrative authority'.

28. In its Recommendation no. (2000) 21 the Committee of Ministers of the Council of Europe recommends the governments of Member States to take or reinforce, as the case may be, all measures they consider necessary with a view to implementing the freedom of exercise of the profession of lawyer. For instance, 'lawyers should not suffer or be threatened with any sanctions or pressure when acting in accordance with their professional standards'. Lawyers should, however, 'respect the judiciary and carry out their duties towards the court in a manner consistent with domestic legal and other rules and professional standards' (principles I:4 and III:4).

The law

I. Alleged violation of article 10 of the convention

29. The applicant complained that her right to express herself freely in her capacity as defence counsel was violated in that she was found guilty of having defamed prosecutor T. She invoked Article 10 of the Convention, the relevant part of which provides:

'1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to ... impart information and ideas without interference by public authority ...

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.'

A. Existence of an interference

30. The participants in the proceedings agreed that the applicant's conviction amounted to an interference with the exercise of her right to freedom of expression. The Court sees no reason to conclude otherwise.

B. Justification of the interference

31. An interference contravenes Article 10 unless it is 'prescribed by law', pursues one or more of the legitimate aims referred to in paragraph 2 of Article 10 and is 'necessary in a democratic society' for achieving such an aim or aims.

1. 'Prescribed by law'

32. The applicant challenged the domestic courts' interpretation of the Penal Code, namely that it could be applied even to defence counsel's submissions to a trial court.

33. The Government recalled that the applicant was convicted of defamation on the basis of chapter 27, section 2, of the Penal Code, as in force at the relevant time. The interpretation of that provision in the case in point was in no way arbitrary and the interference was thus 'prescribed by law'.

34. The Court accepts that the interference was based on a reasonable interpretation of chapter 27, section 2, of the Penal Code, as in force at the relevant time. It was thus 'prescribed by law'.

2. Legitimate aim

35. The applicant argued that the interference served none of the legitimate aims enumerated in Article 10 § 2.

36. In the Government's view, the interference served the legitimate aim of protecting the reputation and rights of prosecutor T. and further sought to maintain the authority of the judiciary and the justice system as a whole.

37. The Court notes that in her written submissions as defence counsel the applicant criticised prosecutor T.'s decision to press charges against a certain person, thereby preventing the applicant's client from examining that person as a witness. In addition, the applicant criticised the prosecutor's decision not to charge another person, who was therefore able to testify

7 Raadkamer Corr. Brussel 22 mei 2001, Journ. Proc. 2001, afl. 417, 27. Vgl. Cass. 2 juni 1982, Arr. Cass. 1981-1982, 1219; Cass. 18 oktober 1988, R.W. 1988-1989, 1029 en Cass. 31 mei 2000, nr. P.00.258.F.V.M. vs. C.R. en W.S., <http://www.cass.be>. Zie ook D. Voorhoof, 'The Lawyer's Freedom of Expression in the Courtroom', in M. Meier-Wang, o.c., <http://www.interights.org>.

8 Zie art. 428-476 en vooral 456 Ger.W. Artikel 456 bepaalt: 'De Raad van de

against her client. The applicant considered these two decisions to form part of a prosecution strategy which she described as 'role manipulation', a term appearing in a Norwegian precedent to which she referred.

38. The Court need not decide whether the proceedings instituted by T. as a private prosecutor served the legitimate aim of protecting the judiciary, as the Court can accept that the interference in any case pursued the legitimate aim of protecting the reputation and rights of T.

3. 'Necessary in a democratic society'
(a) The parties' submissions

39. The applicant maintained that the interference in question had not met the requirement of 'necessity'. The criticism leading to her conviction for defamation was appropriate and based on facts which have not been contested. A defence counsel must be free to express truthful statements which the opposite party does not want to hear. Article 10 must be interpreted so as to proscribe any interference by a public authority, and any threat of such an interference, with the manner in which the defence of an accused is being conducted.

40. The Government considered that the interference could be deemed 'necessary in a democratic society' in order to pursue the above-mentioned aims. It did not accept the conclusions drawn by the intervenor, noting that they were based only on a small sample of legal systems, some of which were non-European. The exercise of the freedom of expression carried with it certain duties and responsibilities, as also emphasised in Recommendation (2000) 21 to Council of Europe member States. The applicant's statements were made in her capacity as defence counsel and not with the intention of generally imparting information and ideas. Not being a member of the Bar, the applicant was not subject to possible disciplinary proceedings within that institution. Not applying the Penal Code to her would therefore have placed her in a preferential position compared with members of the Bar.

41. It was the Government's submission that public prosecutors formed part of the judicial machinery in the broad sense and must therefore, like the courts, enjoy public confidence. Having regard to the key role of the legal profession, it was also legitimate to expect its members to contribute to the proper administration of justice, and thus to maintain public confidence therein. Although the limits of acceptable criticism of civil servants were wider than in relation to a private individual, the national courts were better placed to strike a balance between the various interests at stake, including the dignity of the legal profession.

42. The Government reiterated that the applicant was convicted of having alleged that T. had acted contrary to his official duties as a public prosecutor, thereby committing an offence in office. Such an allegation was neither necessary nor even useful from the point of view of the applicant's client's defence. Whereas counsel for the co-accused had also objected to the hearing of the applicant's client's brother as a witness, they had done so without resorting to allegations that prosecutor T. had committed an offence in office and without describing his behaviour as 'deliberate' or 'blatant abuse of discretion' or accusing him of bringing 'trumped-up charges', to mention but a few of the sharply worded statements which the applicant had prepared in advance of the hearing and which could not therefore be equated with statements made in the course of a heated oral exchange of views. Had the applicant succeeded in proving the truthfulness of her allegations, T. could have been sentenced to imprisonment and dismissed.

43. The Government conceded that the threat of an action for defamation, whether in the form of a private prosecution

initiated by a civil servant or on behalf of the public, could have an inhibiting effect on the freedom of expression of counsel, who might be inclined not to voice even appropriate criticism. In the specific circumstances, however, the interference in question was not disproportionate to the legitimate aim pursued, having ultimately taken the form of a mere conviction without any resultant criminal sanction, and the domestic courts had not therefore exceeded their margin of appreciation.

(b) The Court's assessment
(i) General principles

44. In exercising its supervisory jurisdiction, the Court must look at the impugned interference in the light of the case as a whole, including the content of the remarks held against the applicant and the context in which she made them. In particular, it must determine whether the interference in question was 'proportionate to the legitimate aims pursued' and whether the reasons adduced by the national authorities to justify it are 'relevant and sufficient'. In doing so, the Court has to satisfy itself that the national authorities applied standards which were in conformity with the principles embodied in Article 10 and, moreover, that they based themselves on an acceptable assessment of the relevant facts.

45. The Court reiterates that the special status of lawyers gives them a central position in the administration of justice as intermediaries between the public and the courts. Such a position explains the usual restrictions on the conduct of members of the Bar. Moreover, the courts – the guarantors of justice, whose role is fundamental in a State based on the rule of law – must enjoy public confidence. Regard being had to the key role of lawyers in this field, it is legitimate to expect them to contribute to the proper administration of justice, and thus to maintain public confidence therein (see the *Schöpfer v. Switzerland* judgment of 20 May 1998, Reports of Judgments and Decisions 1998-III, pp. 1052-1053, §§ 29-30, with further references).

46. The Court further recalls that Article 10 protects not only the substance of the ideas and information expressed but also the form in which they are conveyed. While lawyers too are certainly entitled to comment in public on the administration of justice, their criticism must not overstep certain bounds. In that connection, account must be taken of the need to strike the right balance between the various interests involved, which include the public's right to receive information about questions arising from judicial decisions, the requirements of the proper administration of justice and the dignity of the legal profession. The national authorities have a certain margin of appreciation in assessing the necessity of an interference, but this margin is subject to European supervision as regards both the relevant rules and the decisions applying them (see the aforementioned *Schöpfer* judgment, pp. 1053-1054, § 33). However, in the field under consideration in the present case there are no particular circumstances – such as a clear lack of common ground among member states regarding the principles at issue or a need to make allowance for the diversity of moral conceptions – which would justify granting the national authorities a wide margin of appreciation (cf., for example, the *Sunday Times v. the United Kingdom* judgment of 26 April 1979, Series A no. 30, pp. 35-37, § 59, with further reference to the *Handyside v. the United Kingdom* judgment of 7 December 1976, Series A no. 24).

(ii) Application of the above principles to the instant case

47. Turning to the facts of the present case, the Court's task is to determine whether, in all the circumstances, the restriction

on Ms Nikula's freedom of expression answered a 'pressing social need' and was 'proportionate to the legitimate aim pursued' and whether the reasons adduced by the national courts in justification of it were 'relevant and sufficient'.

48. The limits of acceptable criticism may in some circumstances be wider with regard to civil servants exercising their powers than in relation to private individuals. It cannot be said, however, that civil servants knowingly lay themselves open to close scrutiny of their every word and deed to the extent to which politicians do and should therefore be treated on an equal footing with the latter when it comes to criticism of their actions. Civil servants must enjoy public confidence in conditions free of undue perturbation if they are to be successful in performing their tasks. It may therefore prove necessary to protect them from offensive and abusive verbal attacks when on duty (*Janowski v. Poland* [GC], no. 25716/94, § 33, ECHR 1999-I, with further references). In the present case the requirements of such protection do not have to be weighed in relation to the interests of the freedom of the press or of open discussion of matters of public concern since the applicant's remarks were not uttered in such a context.

49. The Court would not exclude the possibility that, in certain circumstances, an interference with counsel's freedom of expression in the course of a trial could also raise an issue under Article 6 of the Convention with regard to the right of an accused client to receive a fair trial. 'Equality of arms' and other considerations of fairness therefore also militate in favour of a free and even forceful exchange of argument between the parties. The Court nevertheless rejects the applicant's proposition that defence counsel's freedom of expression should be unlimited.

50. The present applicant was convicted for having criticised a prosecutor for decisions taken in his capacity as a party to criminal proceedings in which the applicant was defending one of the accused. The Court reiterates the distinction in various Contracting States between the role of the prosecutor as the opponent of the accused, and that of the judge (see § 25 above). Generally speaking, this difference should provide an increased protection for statements whereby an accused criticises a prosecutor, as opposed to verbally attacking the judge or the court as a whole.

51. It is true that the applicant accused prosecutor T. of unlawful conduct, but this criticism was directed at the prosecution strategy purportedly chosen by T., that is to say, the two specific decisions which he had taken prior to the trial and which, in the applicant's view, constituted 'role manipulation ... breaching his official duties'. Although some of the terms were inappropriate, her criticism was strictly limited to T.'s performance as prosecutor in the case against the applicant's client, as distinct from criticism focusing on T.'s general professional or other qualities. In that procedural context T. had to tolerate very considerable criticism by the applicant in her capacity as defence counsel.

52. The Court notes, moreover, that the applicant's submissions were confined to the court room, as opposed to criticism against a judge or a prosecutor voiced in, for instance, the media (cf. the aforementioned *Schöpfer* judgment, p. 1054, § 34; *Prince v. the United Kingdom*, application no. 11456/85, Commission decision of 13 March 1986, DR 46, p. 222). Nor can the Court find that the applicant's criticism of the prosecutor, being of a procedural character, amounted to personal insult (cf. *W.R. v. Austria*, no. 26602/95, Commission decision of 30 June 1997 (unreported) in which counsel had described the opinion of a judge as 'ridiculous', and *Mahler v. Germany*, application no. 29045/95, Commission decision of 14 January 1998 (unreported), where counsel had asserted that the prose-

cutor had drafted the bill of indictment 'in a state of complete intoxication').

53. The Court further reiterates that even if the applicant was not a member of the Bar and therefore not subject to its disciplinary proceedings, she was nonetheless subject to supervision and direction by the trial court. There is no indication that prosecutor T. requested the presiding judge to react to the applicant's criticism in any other way than by deciding on the procedural objection of the defence as to hearing the prosecution witness in question. The City Court indeed limited itself to dismissing that objection. Still, the presiding judge could have interrupted the applicant's pleadings and rebuked her even in the absence of a request to that end from the prosecutor. The City Court could even have revoked her appointment as counsel under the legal-aid scheme or excluded her as counsel in the trial. In this context the Court would stress the role of the courts and the presiding judge to direct proceedings in a manner such as to ensure the proper conduct of the parties and above all the fairness of the trial – rather than to examine in a subsequent trial the appropriateness of a party's statements in the court room.

54. It is true that, following the private prosecution initiated by prosecutor T., the applicant was convicted merely of negligent defamation. It is likewise relevant that the Supreme Court waived her sentence, considering the offence to have been minor in nature. Even if the fine imposed on her was therefore lifted, her obligation to pay damages and costs remained. Even so, the threat of an ex post facto review of counsel's criticism of another party to criminal proceedings – which the public prosecutor doubtless must be considered to be – is difficult to reconcile with defence counsel's duty to defend their clients' interests zealously. It follows that it should be primarily for counsel themselves, subject to supervision by the bench, to assess the relevance and usefulness of a defence argument without being influenced by the potential 'chilling effect' of even a relatively light criminal sanction or an obligation to pay compensation for harm suffered or costs incurred.

55. It is therefore only in exceptional cases that restriction – even by way of a lenient criminal sanction – of defence counsel's freedom of expression can be accepted as necessary in a democratic society. Both the Acting Prosecuting Counsel's decision not to bring charges against the applicant and the minority opinion of the Supreme Court suggest that the national authorities were also far from unanimous as to the existence of sufficient reasons for the interference now in question. In the Court's view such reasons have not been shown to exist and the restriction on Ms Nikula's freedom of expression therefore failed to answer any 'pressing social need'.

56. In these circumstances the Court concludes that Article 10 has been violated in that the Supreme Court's judgment upholding the applicant's conviction and ordering her to pay damages and costs was not proportionate to the legitimate aim sought to be achieved.

